PP

v.

IFEANYI CHRISTIAN NWANKWO

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: B-05-78-03-2013]
11 JUNE 2014

CRIMINAL PROCEDURE: *Appeal - Appeal against acquittal and discharge - Accused charged for trafficking in dangerous drugs - Drugs seized at airport - Ambiguity over identity of drugs - Exhibits tendered inconsistent with handing over list - Contradiction of statements between raiding officer and investigating officer - Drugs produced in court too stiff and large to fit into original wrapping - Whether detrimental to prosecution's case - Whether prima facie case established*

EVIDENCE: *Exhibit - Identity of exhibits - Accused charged for trafficking in dangerous drugs - Drugs seized at airport - Ambiguity over identity of drugs - Exhibits tendered inconsistent with handing over list - Contradiction of statements by raiding officer and investigating officer - Drugs produced in court too stiff and large to fit into original wrapping - Whether exhibits tampered with - Whether exhibits admissible as evidence*

In the High Court, the accused ('the respondent') was charged for trafficking in dangerous drugs at the Kuala Lumpur International Airport. In the black bag which the respondent was carrying, a cylinder containing three transparent packets of substances was recovered. Upon analysis, the substances were found to be a total of 1839.3g of methamphetamine. The raiding officer ('SP4') marked the three packets as G4, G5 and G6, respectively and passed them to the investigating officer ('SP6') who then made his own markings. In court, the packets produced were marked with G2, G3 and G4, which were inconsistent with the handing over list ('exh. P7'). Furthermore, SP4 stated that the item seized was in the form of 'ketulan jernih' while the investigating officer described it as 'serbuk'. In addition to that, the remnant drugs produced in court were too stiff and large to

fit into the original wrapping. In invoking ss. 93 and 94 ('the provisions') of the Evidence Act 1950 ('the Act'), the trial judge did not accept the allegation of typographical error in exh. P7 and held that the error should have been corrected. His Lordship did not accept the explanation given by the chemist that after two years, the substances had solidified and were no longer in loose form. At the end of the prosecution's case, the trial judge held that the prosecution had failed to prove a *prima facie* case and the respondent was acquitted and discharged. Hence, the present appeal by the prosecution. The prosecution argued that the three plastic packets were mistakenly marked by SP4 and notwithstanding the mistakes, SP4 and SP6 identified their markings and signatures on the exhibits. According to the prosecution, the provisions of the Act would only apply to bilateral documents and the law allows SP4 to correct his evidence. The respondent, however, submitted that there was a real possibility that the exhibits were tampered with.

Held (dismissing appeal; affirming order of acquittal and discharge)

Per Tengku Maimun JCA delivering the judgment of the court:

(1) Although the provisions of the Act were not applicable to the present case, the trial judge who had heard the witnesses was the best person to decide whether to accept or to reject the explanation given by SP4 that there was a mistake or a typographical error in exh. P7. (para 17)

(2) There were sufficient grounds to support the finding of facts by the trial judge. There was no explanation as to why SP4 had given the same marking to two different items, *ie*, the three transparent packets and the cylinder. There was no explanation either as to whether there was a mistake in the markings for the cylinder. The different markings on the exhibits stated in exh. P7 and on the exhibits tendered in court had seriously compromised the identity of the drugs. (para 20)

(3) There was nothing in evidence to show the link between the orange tag allegedly found together with the three plastic packets and the respondent. Taking into account the evidence of SP4 that the tag had nothing to do with this case, coupled with the fact that the exhibits tendered in the court bore

different markings from what was listed in exh. P7 and that the packets could not fit into the cylinder, there was much force in the submission of the respondent that there was a real possibility that the exhibits had been tempered with. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, tertuduh ('responden') dituduh mengedar dadah berbahaya di Lapangan Terbang Kuala Lumpur. Di dalam sebuah beg hitam yang dibawa oleh responden, satu silinder berisi tiga paket lutsinar serbuk telah dirampas. Setelah dianalisa, serbuk yang dijumpai tersebut didapati sebagai sejumlah 1839.3g methamphetamine. Pegawai serbuan ('SP4') menandakan ketiga-tiga paket tersebut masing-masing sebagai G4, G5 dan G6 dan menyerahkan kesemuanya kepada pegawai penyiasat ('SP6') yang kemudiannya membuat tandaannya sendiri. Di mahkamah, paket-paket yang dikemukakan ditanda sebagai G2, G3 dan G4, yang mana tidak selaras dengan senarai penyerahan ('eks. P7'). Selanjutnya, SP4 menyatakan bahawa item yang dirampas adalah dalam bentuk ketulan jernih manakala pegawai penyiasat mengatakan ia sebagai serbuk. Tambahan lagi, sisa dadah yang dikemukakan di mahkamah adalah terlalu keras dan besar untuk dimuatkan dalam bungkusan asal. Dengan membangkitkan ss. 93 dan 94 ('peruntukan-peruntukan tersebut') Akta Keterangan 1950 ('Akta'), hakim bicara tidak menerima dakwaan kesilapan menaip dalam eks. P7 dan memutuskan bahawa kesilapan tersebut sepatutnya diperbetulkan. Yang Arif tidak menerima penerangan yang diberikan oleh ahli kimia bahawa selepas dua tahun, serbuk-serbuk telah mengeras dan tidak lagi dalam bentuk serbuk. Di akhir kes pendakwaan, hakim bicara memutuskan bahawa pihak pendakwaan gagal membuktikan kes *prima facie* dan responden dilepaskan dan dibebaskan daripada dakwaan terhadapnya. Oleh itu, rayuan ini oleh pihak pendakwaan. Pihak pendakwaan menghujahkan bahawa ketiga-tiga paket plastik tersebut tersilap ditanda oleh SP4 dan walau apa pun kesilapan tersebut, SP4 dan SP6 telah mengenal pasti penandaan-penandaan tersebut dan tandatangan-tandatangan pada ekshibit-ekshibit. Menurut pihak pendakwaan, peruntukan-peruntukan Akta hanya akan terpakai kepada dokumen-dokumen dua hala dan undang-undang membenarkan SP4 untuk membetulkan keterangannya. Responden, walau bagaimanapun, menghujahkan bahawa kemungkinan besar ekshibit-ekshibit tersebut telah diusik.

Diputuskan (menolak rayuan; mengesahkan perintah pelepasan dan pembebasan)
Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Walaupun peruntukan-peruntukan Akta tidak terpakai dalam kes ini, hakim bicara yang telah mendengar saksi-saksi, adalah individu yang terbaik untuk menentukan sama ada ingin menerima atau menolak penerangan yang diberikan oleh SP4 bahawa terdapat kesilapan atau kesilapan menaip dalam eks. P7.

(2) Terdapat alasan-alasan yang mencukupi untuk menyokong dapatan hakim bicara. Tiada penerangan tentang mengapa SP4 telah memberikan tandaan yang sama kepada dua item berbeza iaitu ketiga-tiga paket lutsinar dan silinder tersebut. Tiada penerangan tentang sama ada terdapat kesilapan dalam penandaan bagi silinder. Penandaan-penandaan berbeza pada ekshibit-ekshibit yang dinyatakan dalam eks. P7 dan pada ekshibit-ekshibit yang dikemukakan di mahkamah telah menjejaskan identiti dadah tersebut secara serius.

(3) Tiada apa pun dalam keterangan yang menunjukkan hubungan antara penanda jingga yang didakwa dijumpai bersama-sama dengan ketiga-tiga paket plastik tersebut dengan responden. Mengambil kira keterangan SP4 bahawa penanda tersebut tidak mempunyai kaitan dengan kes ini, ditambah dengan fakta bahawa ekshibit-ekshibit yang dikemukakan dalam mahkamah mempunyai penandaan yang berbeza daripada apa yang disenaraikan dalam eks. P7 dan bahawa paket-paket tersebut tidak muat ke dalam silinder, terdapat kekuatan pada hujahan responden bahawa terdapat kemungkinan besar ekshibit-ekshibit tersebut telah diusik.

Case(s) referred to:
Datuk Haji Harun Haji Idris & Ors v. PP [1977] 1 LNS 24 FC ***(refd)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(refd)***
Lew Wai Loon v. PP [2014] 2 CLJ 649 FC ***(refd)***
PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92, 93, 94

For the appellant - Munahyza Mustafa; DPP
For the respondent - Ramkarpal Singh; M/s Karpal Singh & Co

[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-80-2011]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun JCA:

[1] The respondent was charged for trafficking in dangerous drugs to wit 1,839.3g of methamphetamine at Level 3, Main Terminal Building, Kuala Lumpur International Airport on 19 November 2010.

[2] In brief, the prosecution's case is as follows. The respondent was carrying two bags with him when he was detained by SP4. The bags were scanned. Nothing suspicious was discovered from the scanning. The bags were then physically inspected by SP4. In a black Samsonite bag having the name tag of the respondent (exh. P19), SP4 found one cylinder (exh. P23). From the cylinder, SP4 recovered three transparent packets which contained substances suspected to be drugs.

[3] The packets were seized by SP4. SP4 marked the three packets as G4, G5 and G6. SP4 then handed the packets with other items seized from the respondent to the investigating officer, SP6. The handing over list (exh. P7) was signed by both SP4 and SP6. The three transparent plastic packets were listed as item 8(3) of exh. P7 with the markings G4, G5 and G6. SP6 confirmed that he had received the items from SP4 as per the markings. SP6 then made his own markings on the three plastic packets as E1, E2 and E3 before sending the exhibits to the chemistry department in a box marked E.

[4] Upon analysis, the chemist ("SP5") confirmed that the substances from E1, E2 and E3 were 602.5g, 601.0g and 635.8g of methamphetamine respectively.

[5] At the end of the prosecution's case, the learned trial judge made the following finding:

A As the charge against the accused is possession of dangerous drugs for purpose of trafficking, the vital element of the charge is the dangerous drugs itself. It is incumbent upon the prosecution and in fact it is mandatory upon the prosecution to produce in court the very drugs that were seized from the accused. There cannot be any compromise in the identity of the drugs.

B

…

In this case SP4 the raiding officer had handed over the all (*sic*) items seized from the accused to the investigating officer SP6 which included the 3 packets of drugs. In handing over the exhibits it is the norm among the police officers to prepare a handing over list. The purpose of handing over list is to corroborate the oral testimony of the police officers of the handing over and receipt of the seized items. In this case the handing over list was tendered and marked as P6 (*sic*) and bore the signature of both SP4 and SP6.

C

D

It was clear from SP6 (*sic*) that before preparation of this list the incriminating items ie, the Samsonite bag from which the car cylinder containing the 3 packets of drugs were found had been marked by SP4. The markings on the incriminating items are again a practice to corroborate the oral testimony of the raiding officer that these were the very items he had seized.

E

It therefore becomes disastrous for the prosecution if the marking and the document instead of corroborating the oral testimony goes against it, as which has happened in this case. It is apparent from P6 (*sic*) that the 3 transparent packets had been marked G4, G5 and G6. However when the 3 transparent packets were produced in court the marking on them were G2, G3 and G4.

F

SP4 tried to explain the discrepancies as a typo error on P6 (*sic*). It is rule of evidence that oral testimony cannot vary the contents of a document. There are 2 provisions of the Evidence Act 1950 which illustrates this.

G

[6] After adverting to the provisions of ss. 93 and 94 of the Evidence Act 1950, the learned trial judge said:

H

Further I cannot accept the fact that not 1 but 2 police officers overlooked the error if any on P6 (*sic*) as to the markings. If there was typo error as alleged by SP4 then it should have been corrected then and there as SP4 had chosen to do further down where he had included an item missed out earlier and signed on the addition made on the document.

I

To compound to the issue of identity of the drugs seized was the description given to the drugs seized when SP4 stated that the item seized was in the form of 'ketulan jernih' whereas the investigating officer described it as 'serbuk'. The 2 words 'ketulan' and 'serbuk' connotes 2 different forms. It was incumbent on the prosecution to clarify the actual form and not let the matter be hanging.

The final nail in the coffin on the issue of the identity in this case was when the remnants after analysis of the drugs seized were produced in court and the defence counsel asked to be demonstrated whether it could fit into the original wrappings it could be seen that the remnant drugs were too stiff and large to fit into the wrappings.

The explanation given by the chemist (SP5) was that after 2 years the substances had solidified and no more in the loose form and therefore that could be the reason why it could not fit in the original packet despite the fact part of it had been taken for analysis. I could not accept this explanation of the chemist as she was merely speculating ...

As a final determination of this case and as a result of the failure of the prosecution to prove the identity of the drugs seized, I ruled that the prosecution had failed to prove a *prima facie* case against the accused. I therefore directed the accused to be acquitted and discharged of the charge against him.

[7] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal. Before us, the only issue canvassed by the learned Deputy Public Prosecutor was on the identity of the drugs.

[8] It was the submission of learned Deputy Public Prosecutor that the three plastic packets were mistakenly marked by SP4 as G4, G5 and G6 in the handing over list, exh. P7 and that notwithstanding the mistake, SP4 and SP6 identified their markings and signatures on the exhibits. It was further the submission of learned Deputy Public Prosecutor that s. 92 of the Evidence Act 1950 only applies to bilateral documents and that the law allows SP4 to correct his evidence.

[9] For the respondent, learned counsel submitted that the explanation on the markings of the exhibit was an afterthought and that there are other infirmities in respect of the exhibits. In court, SP4 and SP5 tried to fit the packets containing the drugs into the cylinder but they found the packets too big. The packets could not fit into the cylinder.

[10] The other infirmity was in respect of the discovery in court of an orange tag. SP4 could not account for the orange tag found in the box. According to SP4, the orange tag has nothing to do with this case. SP5 on the other hand said the orange tag was in the box together with the three plastic packets when SP6 delivered the exhibits to her for analysis. SP6 said he only realised the presence of the orange tag when the box was opened by SP5 at the chemistry department. It was the submission of learned counsel that there was a real possibility that the exhibits were tampered with.

Our Findings

[11] To recapitulate, what had happened in this case was that although SP4 and SP6 had both testified (which testimony was consistent with exh. P7) that the markings of the three plastic packets were G4, G5 and G6, when the box containing the exhibits was opened in court during the examination-in-chief of SP4, the exhibits produced (P33, P34 and P35) were not the exhibits marked G4, G5 and G6. Instead the exhibits bore the markings of G2, G3 and G4. Faced with the discrepancy, the learned trial judge in fact posed this question to SP4 "Tadi kamu kata kamu tanda bungkusan itu dengan G4, G5 and G6" to which SP4 answered "Saya tak ingat" (RR1: p. 39).

[12] In cross-examination (RR1: pp. 49-50), the following was the evidence of SP4:

> S: Setuju menurut P7, serah dan terima barang kes ini, memang wujud bungkusan-bungkusan yang kamu sendiri tandakan sebagai G4, G5 dan G6
>
> J: Ya.
>
> S: G4, G5 dan G6 ini kamu telah pun menyatakan di sini sebagai bungkusan plastic lutsinar berbalut kertas karbon biru mengandungi Kristal. Itulah barang-barang yang disyaki dalam kes ini?
>
> J: Ya.
>
> S: So, saya katakan itulah tandaan yang dibuat oleh kamu pada masa itu untuk 3 bungkusan yang disyaki tersebut?
>
> J: Ya.

S: Lain-lain tandaan tidak dibuat terhadap bungkusan-bungkusan tersebut? A

J: Ya.

S: ...

B

J: ...

S: Ada 3 wrapper yang berwarna coklat, itu yang kami telah mark di mahkamah itu P33, P34, P35, betul?

J: Ya. C

S: Ianya ditanda di sana G2, G3 dan G4 kan?

J: G2, G3 dan G4.

[13] At this juncture, SP4 did not offer any explanation on why D the exhibits tendered in court had a different marking from what he had handed over to SP6. In re-examination (RR1: p. 61) the following question was asked by the learned Deputy Public Prosecutor "... Boleh nyatakan mengapa tandaan pada plastic ini tidak sama sepertimana ditulis pada P7?". The answer by SP4 was E "Saya tersilap tanda pada borang serah terima dan borang serah terima barang kes ini. Yang sebenarnya sepertimana yang tercatat pada P33, P34 dan P35."

[14] The submission for the prosecution was that the learned trial F judge erred in relying on ss. 93 and 94 of the Evidence Act 1950 when His Lordship rejected the oral explanation made by SP4 as regards exh. P7. It was argued that ss. 93 and 94 had to be read in the context of ss. 91 and 92 of the same Act; that ss. 91 and 92 only applies to bilateral instruments and dispositive documents between contracting parties and that the provisions do not apply G to the evidence of SP4 and SP6.

[15] In *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180, the learned trial judge said the following in respect of s. 92: H

> ... in the context of the wording in s. 92 of the Evidence Act 1950, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property which the law requires to I be reduced to writing, and not to every and all matters which the law requires to be reduced into a document, as for instance, the

depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such depositions.

[16] The Federal Court in *Datuk Haji Harun Haji Idris & Ors v. PP* [1977] 1 LNS 24; [1978] 1 MLJ 240 agreed with the trial judge on the applicability of ss. 91 and 92 of the Evidence Act 1950 (see also *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421; [1997] 4 MLJ 329).

[17] Based on the above authorities we agree with the learned deputy public prosecutor to the extent that ss. 91 and 92 are not applicable to the present case. Be that as it may, it must be emphasised that the learned trial judge who has heard the witnesses, is the best person to decide whether to accept or to reject the explanation given by SP4 that there was a mistake or a typographical error in exh. P7.

[18] In *Lew Wai Loon v. PP* [2014] 2 CLJ 649 where the Federal Court was also dealing with the issue of identity of exhibits, His Lordship Richard Malanjum CJ (Sabah & Sarawak) said:

> [25] ... it is essential to first appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. (See: *R v. Uxbridge Justices, Ex parte Sofaer & Another* (1987) 85 Cr App R 367; *Butera v. Director of Public Prosecutions* (1987) 62 ALJR 7; *R v. Stipendiary Magistrate at Lambeth & Another, Ex parte McComb* [1983] 1 All ER 321). It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved. (See: *R v. Osbourne & Virtue* [1973] 2 WLR 209; *Thompson v. R* [1918] AC 221). Further, before an exhibit is admitted into evidence the foundation for its admission must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence. (See: *R v. Nikolovski* [1996] 3 SCR 1197 (Canada)).
>
> [26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.

[19] Coming back to the instant appeal, the explanation by SP4 on the exhibits was "Saya tersilap tanda pada borang serah terima dan borang serah terima barang kes ini. Yang sebenarnya sepertimana yang tercatat pada P33, P34 dan P35." His Lordship had rejected the explanation for the reason that the error if any, could have been corrected by SP4 then and there as SP4 had done where he had included an item missed out earlier by putting his signature on the addition made to exh. P7.

[20] We loathe to interfere with the finding of fact made by the learned trial judge. Further, we find that there are sufficient grounds to support the said finding of the learned trial judge. The explanation of SP4 was that the markings in exh. P7 were wrongly stated and that the correct markings ought to have been G2, G3 and G4 as seen from the exhibits produced in court. However, the 'silinder logam bersama penutup dan besi' had also been marked G2, G3 and G4 in exh. P7. There was no explanation as to why SP4 had given the same markings G2, G3 and G4 to two different items ie, the three transparent packets and the cylinder items. There was no explanation either as to whether there was a mistake in the markings of G2, G3 and G4 for the cylinder. In the circumstances, we agree with the learned trial judge that the different markings on the exhibits stated in exh. P7 and on the exhibits tendered in court had seriously compromised the identity of the drugs.

[21] Apart from that, when the box containing the exhibits was opened in court, SP4 was confronted with a foreign object ie, an orange tag. The following evidence was elicited from SP4 in cross-examination (RR1: p. 60):

> S: Dalam kotak jabatan kimia tu, tadi kita buka kotak itu bukan? Ada pakai pisau untuk buka kotak itu kan? Dalam kotak itu ada 3 bungkusan, ada juga satu barang macam berwarna oren kan? Apa itu?
>
> J: Ini adalah tag standby.
>
> S: Kena mengena dengan apa ni? Adakah ini dicatatkan di mana-mana rekod yang disi oleh Inspektor seperti di dalam P6 dan P7. Adakah apa-apa rekod yang menyatakan tag standby seperti ini?
>
> J: Tidak.

S: So, tag standby ini datang dari kes lain?

J: Saya tak tahu macam mana dia boleh ada dalam ini.

S: Bukan dari kes ini bukan?

J: Saya tak tahu.

S: ...

J: ...

S: So, saya katakan memandangkan tiada apa-apa rekod whatever it is, saya katakan ia tidak kena mengena dengan kes ini. Setuju bukan?

J: Ya.

[22] We are mindful of the evidence of SP5 and SP6 as to the discovery of the orange tag. In this regard, we find nothing in the evidence to show the link between the orange tag and the respondent. Taking into account the evidence of SP4 that the tag had nothing to do with this case, coupled with the fact that the exhibits tendered in court bore different markings from what were listed in exh. P7 and that the packets could not fit into the cylinder, we are of the view that there is much force in the submission of learned counsel for the respondent that there is a real possibility that the exhibits have been tampered with.

[23] Having regard to all of the above, we do not find any good reason to substitute the finding of the learned trial judge. In our judgment, the learned trial judge had not erred in finding that the prosecution had failed to prove the identity of the drugs, the vital element of the charge against the respondent. We therefore unanimously dismissed the appeal by the prosecution and affirmed the order of acquittal and discharge of the respondent.